

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In re Applications of

NORTHCOAST COMMUNICATIONS,
LLC, and its subsidiaries

And

CELLCO PARTNERSHIP d/b/a
VERIZON WIRELESS

For Consent to Assignment of Fifty
Broadband Personal Communications Service
Licenses

WT Docket No. 03-19
DA 03-172

File Nos. 0001138904, 0001138905, and
0001138909

TO: Chief, Wireless Telecommunications Bureau

**OPPOSITION OF NORTHCOAST COMMUNICATIONS, LLC TO
PETITION TO DENY OF NATIONAL ENGINEERING TECHNICAL COMPANY**

Northcoast Communications, LLC, and its license subsidiaries, Boston Holding, LLC and New York PCS Holding, LLC (collectively “Northcoast”), by their attorneys and pursuant to Section 309(d)(1) of the Communications Act of 1934, as amended,¹ Section 1.939 of the Federal Communications Commission’s (“FCC”) Rules,² and FCC Public Notice DA 03-172, hereby oppose, and urge summary denial or dismissal of, the Petition To Deny of National Engineering Technical Company (“NETCO”), filed on February 20, 2003, regarding the

¹ 47 U.S.C. § 309(d)(1).

² 47 C.F.R. §§ 1.45, 1.939.

captioned assignment applications ("Assignment Applications"). As detailed below, the petition should be denied on both procedural and substantive grounds.

The petition is characterized by two fatal procedural deficiencies, each of which warrant its summary dismissal. First, NETCO has failed to establish that it has standing to file its petition to deny. And second, NETCO's petition does not comply with the procedural requirements of Section 1.939 of the Commission's rules. In addition to these procedural failures, the substance of NETCO's claim falls squarely within the category of private contractual disputes. It is the Commission's long-standing policy to leave to the local courts the resolution of private civil matters. NETCO has not provided any credible public interest reason why the Commission should depart from this policy. Furthermore, NETCO's petition did not raise any issue regarding the qualifications of Cellco Partnership ("Verizon Wireless"), the proposed assignee, as an FCC licensee. Finally, it is noteworthy that the Department of Justice has completed its antitrust review of the proposed transaction, and granted it early termination. Consequently, Northcoast urges the Wireless Telecommunications Bureau (the "Bureau") to deny NETCO's petition, which was the sole petition filed opposing the proposed assignments.

I. THE NETCO PETITION IS PROCEDURALLY FLAWED

A. NETCO Has Not Established That It Has Standing to File the Petition

Under Section 309(d)(1) of the Communications Act, only those entities that can establish that they are a "party in interest" may file a petition to deny an application.³ "Under this portion of the Act, a 'party in interest' must meet essentially the same requirements as those

³ 47 U.S.C. §309(d)(1).

for standing, under 47 U.S.C. Sec. 402(b), to appeal a Commission decision to a federal court.”⁴

Therefore, entities claiming standing must allege and prove: (1) a direct injury, (2) that is "fairly traceable" to the challenged action, *and* (3) a substantial likelihood that the relief requested will redress the injury claimed.⁵

In this case, NETCO clearly has not come close to meeting this test. In fact, NETCO’s petition did not address any of these criteria. According to NETCO’s petition, the dispute between the parties (i.e., the presumed injury) relates to non-payment for certain services provided by NETCO, and NETCO already has sought redress by filing a civil claim to be litigated in state court in Ohio.⁶ Since the alleged “injury” (i.e., breach of contract) is not traceable to the challenged action (i.e., grant of the captioned applications), and the relief requested (dismissal or deferral of the assignment applications) will not redress the alleged breach of contract, under relevant case law, NETCO has not demonstrated that it has standing to file its petition, and its petition should be dismissed.⁷

⁴ *MCI Communications Corp., Transferor, and Southern Pacific Telecommunications Company, Transferee, For Consent to Transfer Control of Qwest Communications, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 7790, 7794 at ¶11 (1997) (citing *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1000, (D.C. Cir. 1966); *Telesis Corp.*, Memorandum Opinion & Order, 68 FCC 2d 696, 698-99. PP 8-9 (1978); *Standards for Determining the Standing of a Party to Petition to Deny a Broadcast Application*, Memorandum Opinion and Order, 82 FCC 2d 89, 95-96, PP 18-19 (1980).

⁵ See *Lugan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Valley Forge Christian College v. Americans United*, 454 U.S. 464, 472 (1982); *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 261 (1977).

⁶ See NETCO Petition at 2.

⁷ See, e.g., *Application of MCI Communications Corp., Transferor, and Southern Pacific Telecommunications Company, Transferee, For Consent to Transfer Control of Qwest Communications, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 1072, ¶11 (CCB, 1994) (“*MCI Communications Corp.*”).

B. The Petition Does Not Comply With the Affidavit and Service Requirements of the Communications Act and Section 1.939 of the FCC's Rules

Section 309(d)(1) of the Communications Act and Section 1.939(c) of the rules both expressly provide that a petition to deny shall contain specific allegations of fact sufficient to show that a grant of the application would be *prima facie* inconsistent with the public interest, convenience and necessity. Such allegations may not be predicated upon information and belief, but rather "shall, except for those of which official notice may be taken, be supported by *affidavit* [or declaration] *of a person or persons with personal knowledge thereof.*"⁸ Further, Section 1.939(g) of the rules states that the Commission "may dismiss any petition to deny that does not comply with the requirements of this section".⁹ NETCO failed to include the required affidavit or declaration with its petition, and its petition clearly states facts that have not been established as a matter of public record.¹⁰ Given this omission, the Bureau must dismiss NETCO's petition as procedurally defective, and should not consider NETCO's claims on their alleged merits.¹¹

NETCO also failed to comply with the service requirements of Section 1.939. Specifically, according to Section 1.939(c), "[a] petitioner shall serve a copy of its petition to deny on the applicant and on all other interested parties pursuant to §1.47."¹² Since counsel for

⁸ *WGRY, Inc.*, 2 R.R.2d (P&F) 718 (1964). *See also* Section 1.939(d) of the rules ("Such allegations of fact, except for those of which official notice may be taken, shall be supported by affidavit of a person or persons with personal knowledge thereof.") 47 C.F.R. § 1.939(d).

⁹ 47 CFR § 1.939(g).

¹⁰ *See* NETCO Petition at pp. 2-5.

¹¹ *See Los Angeles License Renewals*, 68 FCC2d 75 (1978) (petition lacking an affidavit could not be considered even as an informal objection); *see also Scott Broadcasting Corp.*, 52 FCC2d 1029 (1975).

¹² 47 CFR § 1.939(c).

the applicants was provided a copy of the NETCO petition by Commission staff, and no service list is attached to the NETCO petition (other than the cover letter, which is directed to Commission staff), NETCO did not comply with the applicable service requirements. Again, Section 1.939(g) of the rules provides the Bureau with the authority to dismiss petitions not in compliance with its provisions.

Given the pervasive procedural defects with NETCO's petition, it should be summarily dismissed.

II. NETCO'S PETITION IS SUBSTANTIVELY DEFICIENT

Even if NETCO's petition complied with applicable procedural requirements, the substantive claim made involves a matter outside the Commission's jurisdiction. "The Commission has consistently refused to interject itself into private matters, finding that a court, and not the Commission, is the proper forum for resolving such disputes."¹³ NETCO is quite clear that its underlying claim involves a "breach of contract [law]suit presently pending in the Court of Common Pleas of Cuyahoga County, Ohio".¹⁴ This matter then is a classic example of a "private contractual dispute," over which the Commission historically concludes that it has no jurisdiction. While Northcoast takes no position here as to the validity of NETCO's lawsuit, it is well established that the FCC is not the proper forum for resolving these types of issues.¹⁵

¹³ *Applications of AirTouch Communications, Inc., Transferor, and Vodafone Group PLC, Transferee, for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, DA 99-1200 (WTB, rel. June 22, 1999) at ¶6, n.15 (citing *Applications of WorldCom and MCI Communications Corp.*, 13 FCC Rcd 18025, 18148 (1998) and *PCS 2000, L.P.*, 12 FCC Rcd 1681, 1691 (1997)).

¹⁴ NETCO Petition at p.2.

¹⁵ See *Applications of Vodafone AirTouch, PLC., Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control or Assignment of Licenses and Authorizations*, Memorandum Opinion and Order, 15 FCC Rcd 16507, ¶21 (WTB, rel. March 30, 2000) (Bureau refuses to deny grant of transfer and assignment applications due to a pending partnership dispute); *MCI Communications Corp.* 10 FCC Rcd 1072 (CCB, 1994)

Indeed, even NETCO “acknowledges that the Ohio Court of Common Pleas, not the Commission, has jurisdiction to decide the private rights of NETCO and Northcoast.”¹⁶

Finally, Northcoast briefly responds to NETCO’s meritless absurd argument that its pending breach of contract dispute with Northcoast involves moral turpitude on Northcoast’s part, sufficient to warrant denial or deferral of the captioned assignment applications. NETCO makes no attempt to fit its claims within the specific, limited types of misconduct that might raise a character qualifications issue. Further, even if NETCO had made such allegation, the Commission’s settled policy is to consider only *adjudicated* findings of misconduct raising character qualifications.¹⁷ And NETCO itself states, however, that its litigation against Northcoast has merely been filed; no adjudication has occurred. Accordingly, the Bureau should find that this matter is outside its jurisdiction.

III. CONCLUSION

On the merits presented to the Commission, the captioned assignment applications are unopposed. Furthermore, the Department of Justice already has cleared the transaction of any antitrust concerns. This leaves for Bureau consideration NETCO’s petition, which is both procedurally and substantively deficient, and consequently, should be summarily dismissed.

(contractual disputes should be resolved by a court of competent jurisdiction, not the Commission); *see also Sonderling Broadcasting Co.*, 46 R.R.2d (P&F) 889, 894 (1979); *Robert J. Kite*, 3 FCC Rcd 1087 (1988).

¹⁶ NETCO Petition at p.5.

¹⁷ *See Policy Regarding Character Qualifications in Broadcast Licensing*, 102 F.C.C.2d 1179, 1195-97, 1200-03 (1986), *aff’d on recon.*, 1 FCC Rcd 421 (1982), *modified*, 5 FCC Rcd 3252 (1990), *recon. granted in part*, 6 FCC Rcd 3448 (1991), *modified in part*, 7 FCC Rcd 6564, 6566 (1992) (the Commission will consider only adjudicated non-FCC misconduct that involves violations of antitrust or other laws protecting competition).

Respectfully submitted,

/s/ Theresa Z. Cavanaugh

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February 27, 2003

CERTIFICATE OF SERVICE

I, Elinor McCormick, a secretary in the law firm of Cole, Raywid & Braverman, L.L.P., hereby certify that I have this 27th day of February, 2003, caused to be sent by facsimile or email, a copy of the foregoing "Opposition of Northcoast Communications, LLC to Petition to Deny of National Engineering Technical Company" to the following:

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February 27, 2003

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